COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP707 **Cir. Ct. No. 2013TP145**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE TERMINATION OF PARENTAL RIGHTS TO S. L.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

J. S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: REBECCA G. BRADLEY and DAVID C. SWANSON, Judges. *Affirmed*.

¶1 KESSLER, J.[1] J.S. appeals from an amended order terminating his parental rights to his daughter, S.L. He also appeals the order denying his postjudgment motion.[2] We affirm.

BACKGROUND

¶2 J.S. is the biological father of S.L., born on January 19, 2012. S.L. tested positive for marijuana at the time of her birth, prompting a referral to the Division of Milwaukee Child Welfare (DMCPS). DMCPS attempted to keep S.L. with her mother (A.L.) under a safety plan while investigating the referral. Because of concerns of domestic violence between the mother and J.S., and concerns about the mother's ability to protect S.L., the plan prohibited contact between J.S., the mother and S.L.

¶3 The plan only remained in effect for two weeks. On February 2, 2012, DMCPS removed S.L. from A.L.'s care after completing its investigation and concluding that S.L. would not be safe in the mother's home. S.L.'s removal was based, in part, on J.S.'s violation of the no-contact rule between J.S. and A.L. J.S. violated the rule by coming to A.L.'s home, despite the DMCPS requirement that he not do so. DMCPS did not deem placement with J.S. safe. A CHIPS petition was filed on February 9, 2012. The CHIPS dispositional order was issued on May 22, 2012.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The Honorable John DiMotto presided over the jury trial and the dispositional hearing. The Honorable Rebecca G. Bradley entered the amended order terminating J.S.'s parental rights. The Honorable David C. Swanson entered the order denying J.S.'s postjudgment motion.

¶4 Ultimately, the State filed a petition to terminate J.S.'s parental rights to S.L., alleging that S.L. was a child in continuing need of protection or services and that J.S. failed to assume parental responsibility, contrary to WIS. STAT. § 48.415(6). The State voluntarily dismissed the continuing CHIPS ground. A jury trial was held to determine whether J.S. failed to assume his parental responsibilities.

The Jury Trial.

¶5 A jury trial was held in February 2014. Multiple witnesses testified at the trial, including J.S., A.L. and case workers.

¶6 J.S. testified that he and A.L. had an on-again/off-again relationship for the two years leading up to S.L.'s birth. J.S. denied that he and A.L. had a violent relationship prior to S.L.'s birth, but stated that he obtained a restraining order against A.L. in 2010, well before S.L.'s birth. He also stated that in the fall of 2012, A.L.'s "insecurity and jealousy" of his relationship with another woman led her to throw a brick at his car and break his picture window. J.S. testified that he obtained another restraining order against A.L. in the weeks preceding the jury trial because A.L. "was getting belligerent." J.S. also drew attention to his own violent behavior, stating that he was incarcerated following an incident in which he attempted to run A.L. over with his car.

¶7 J.S. also testified to his criminal history, admitting that he committed a total of fourteen crimes. The State elicited testimony showing that throughout the entire course of S.L.'s life, J.S. was either on probation or incarcerated.

¶8 J.S. also stated that his probation agent ordered him not to have any contact with A.L., but that he ignored the order and had contact with A.L. multiple

times, leading to numerous sanctions. The sanctions included "sit[ting] in jail for a couple of days, maybe a day," and missing a meeting with S.L. J.S. testified that he resided at the Milwaukee Secure Detention Facility between January 2013 and August 2013. J.S. stated that during that time he maintained contact with his probation agent and the DMCPS to find out how S.L. was, but "wasn't afforded the opportunity to visit my daughter or call because you have to call collect." J.S. also stated that he did not make any attempts to contact S.L.'s foster parents at any point that she was with them because he did not have their address or phone number.

¶9 A.L. also testified about the volatile relationship she had with J.S. She stated J.S. came to her home shortly after S.L.'s birth, despite the terms of the safety plan prohibiting contact with J.S. A.L. also testified that on February 2, 2012, she moved in with J.S. and lived with him for about a year, until J.S. was incarcerated. A.L. denied that her relationship with J.S. was ever violent, but admitted that "he pushed me a couple of times."

¶10 Lisa Nadkarni, a family case manager with Children's Hospital of Wisconsin Community Services, testified that she had been involved with S.L.'s case since S.L.'s birth in part because she had been involved in cases dealing with A.L.'s other children, and in part because S.L. was born with marijuana in her system and was referred to DMCPS. Nadkarni testified that she was well-aware of the unstable relationship between J.S. and A.L. Nadkarni stated that she instituted a safety plan for S.L. which would keep the baby in her mother's care if A.L. abided by certain rules—one of which was to cease contact with J.S. because A.L. would not be able to protect S.L. in the event of a violent incident between J.S. and A.L.

¶11 Nadkarni also stated that after J.S. was adjudicated the father of S.L.—approximately one month after her birth—Nadkarni offered J.S. supervised visitation. J.S. asked Nadkarni if he and A.L. could have joint visitation with S.L. Nadkarni "explained to him that due to their history of fighting and their violence that I was not going to recommend joint visitation at that time. There was also a no contact order between the two of them." Nadkarni stated that J.S.'s response was vicious, telling Nadkarni that she would need police protection from him. Nadkarni testified that J.S. "started cursing at me, called me a liar, called me racist." Ultimately, Nadkarni suggested two supervised visits per week, with the possibility of increasing visitation. Nadkarni stated that J.S. never took advantage of the opportunity to have increased visits with S.L. Nadkarni stated that J.S.'s visitation periods were interrupted multiple times due to J.S.'s periods of incarceration. Nadkarni also stated that the identity and location of S.L.'s foster parents were available and S.L.'s relocations were disclosed to both parents.

¶12 Angela Desjarlais, also a family case manager with Children's Hospital of Wisconsin Community Services, stated that S.L.'s case was transferred to her in February 2013. She stated that J.S. was incarcerated at that time for attempting to run A.L. over with his car; thus, he was not visiting with S.L. Desjarlais stated that from the time she took over the case, until J.S.'s release in August 2013, she received one letter from J.S. which indicated he wished to see S.L. upon his release. Desjarlais received no other communications from J.S. until his August 2013 release. Desjarlais stated that J.S. and S.L. began having supervised visits after his release, which graduated to unsupervised visits, until Desjarlais received a phone call from A.L. informing Desjarlais that A.L. and J.S. were still in a relationship, despite the no contact order. A.L. also told Desjarlais that she had attended some of J.S.'s unsupervised visits with their daughter.

¶13 The jury found that J.S. failed to assume parental responsibility. At a dispositional hearing on September 5, 2014, the circuit court determined that it was in S.L.'s best interest to terminate J.S.'s parental rights to S.L.

The Postjudgment Motion.

¶14 On September 25, 2014, J.S. filed a notice of intent to pursue post-dispositional relief. On April 7, 2015, J.S. filed a notice of appeal. We remanded to the circuit court so that J.S. could file a postjudgment motion.

¶15 In his postjudgment motion, J.S. argued that WIS. STAT. §48.415(6) was unconstitutional as applied to him because at the time of the grounds trial, S.L. was the subject of a CHIPS proceeding, rendering J.S. "unable to assume the exercise of significant responsibility for the *daily* supervision, education, protection, and care of [S.L.], as required by the failure to assume parental responsibility statute." J.S. also argued that the facts adduced at the grounds trial did not establish that he was unfit.

¶16 The circuit court denied the motion, finding that J.S.'s constitutional challenge was inappropriate on remand, as J.S. never raised it during the termination proceedings. The circuit court did address J.S.'s constitutional challenge, however, in the context of ineffective assistance of counsel. The court found that counsel provided effective representation and that sufficient facts supported the jury's finding. This appeal follows.

DISCUSSION

¶17 On appeal, J.S. argues that: WIS. STAT. §48.415(6) is unconstitutional as applied to him, thus violating his substantive due process rights; the facts adduced at trial do not support a finding that he was unfit; and the

circuit court erroneously failed to consider his constitutional challenge. Alternatively, he argues that his counsel was ineffective.

I. J.S. was not unconstitutionally prevented from assuming parental responsibility.[3]

¶18 J.S. argues that WIS. STAT. § 48.415(6), the failure to assume parental responsibility statute, was unconstitutional as applied to him because a CHIPS order removing S.L. from her parental home prevented him from taking part in S.L.'s daily supervision and care; thus, his right to substantive due process was violated. We disagree.

¶19 Whether a statute is unconstitutional as applied presents a question of law subject to independent appellate review. ***Kenosha Cnty. DHS v. Jodie W.***, 2006 WI 93, ¶22, 293 Wis. 2d 530, 716 N.W.2d 845. Any statute that infringes upon this a parent's liberty interest in parenting his child is subject to strict scrutiny review. *See* ***id.***, ¶41. Under this test, we determine whether the statute is narrowly tailored to advance a compelling State interest that justifies interference with the parent's fundamental liberty interest. *See* ***Monroe Cty. DHS v. Kelli B.***, 2004 WI 48, ¶17, 271 Wis. 2d 51, 678 N.W.2d 831. Because the Wisconsin Supreme Court has already determined that the State's compelling interest in WIS. STAT. § 48.415 is to protect children from unfit parents, *see* ***Kelli B.***, 271 Wis. 2d 51, ¶25, the sole issue here is whether that statute, as applied to J.S., is narrowly tailored to meet the State's compelling interest to protect S.L. *See* ***Kelli B.***, 271 Wis. 2d 51, ¶17.

[3] Both the State and the guardian *ad litem* encourage us not to address this issue because J.S. did not raise the constitutionality of WIS. STAT. § 48.415(6) as applied to him in the circuit court. Given the gravity of a termination of parental rights, we exercise our discretion to address J.S.'s argument.

¶20 In order to establish failure to assume parental responsibility pursuant to WIS. STAT. § 48.415(6), the State must establish that the parent has not had a substantial parental relationship with the child. Section 48.415(6) provides:

> (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

¶21 The crux of J.S.'s argument is that despite efforts to form and maintain a bond with his daughter, the CHIPS order, and the resulting safety plan, prevented him from "provid[ing] his daughter's daily care." Accordingly, his substantive due process rights were violated because he did not have an opportunity to assume parental responsibility within the meaning of the statute.

¶22 J.S.'s argument asks us to take a limited view of the record and to determine, based on this limited view, that the failure to assume parental responsibility ground has been unconstitutionally applied to him. While the record does show that J.S. had visitation with his daughter and attempted to form a bond with her, J.S. ignores the majority of the record which shows that J.S.'s lack of a relationship with S.L. resulted from his own actions.

¶23 The record establishes that J.S.'s own actions, in part, led to the S.L.'s placement outside of the parental home and prevented him from maintaining continuous contact with her. Because J.S. was violent towards S.L.'s mother, the DMCPS did not consider J.S.'s residence safe for S.L. S.L. was removed from her parental home, in part, because J.S. violated the explicit DMCPS rule not to go to A.L.'s home. While on probation, he violated numerous times the no contact order which prohibited contact between him and A.L., despite knowing the consequences of his violations would prevent contact with S.L. J.S. was incarcerated multiple times following S.L.'s birth. One incarceration period stemmed from J.S.'s attempt to run over S.L.'s mother and resulted in missed visitation with S.L. When J.S. was allowed visitation with S.L., he violated the DMCPS rule about joint visitation with A.L. Had J.S. abided by the DMCPS rules and avoided behaviors resulting in his incarceration, J.S. could have had maintained unsupervised visits with S.L. The fact that S.L. was taken into protective custody and was the subject of a CHIPS order did not prevent J.S. from taking part in S.L.'s daily care—J.S.'s own actions did. Accordingly, J.S.'s substantive due process rights were not violated and WIS. STAT. § 48.415(6) was not unconstitutional as applied to him.[4]

[4] Because we conclude that WIS. STAT. § 48.415(6) was not unconstitutional as applied to J.S., we do not address whether trial counsel was ineffective for failing to raise the issue. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel is not ineffective for failing to pursue a meritless issue).

We also note that were we to adopt the logic of J.S.'s constitutional argument (*i.e.*, incarceration prevented his involvement in the daily care of his child), then no parent who has engaged in conduct resulting in incarceration could ever have his or her parental rights terminated. We decline to adopt such an analysis.

II. Sufficiency of the Evidence.

¶24 J.S. also contends that the facts adduced at trial did not establish that he was unfit. In essence, J.S. is arguing that the evidence was insufficient to support the jury's determination that he failed to assume parental responsibility for his daughter.

¶25 When reviewing the sufficiency of the evidence, we use a highly deferential standard of review. *See* ***State v. Quinsanna D.***, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 655 N.W.2d 752. We sustain the jury's verdict if there is any credible evidence to support it. *See* ***id.*** We search the record for evidence that supports the verdict, accepting any reasonable inferences the jury could reach. *See* ***id.***

¶26 Failure to assume parental responsibility is established by proof that the parent has not had a substantial parental relationship with the child. WIS. STAT. § 48.415(6)(a); ***State v. Bobby G.***, 2007 WI 77, ¶45, 301 Wis. 2d 531, 734 N.W.2d 81. "Substantial parental relationship" is defined by statute as "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." WIS. STAT. § 48.415(6)(b).

¶27 As stated, WIS. STAT. § 48.415(6)(b) provides:

> In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

¶28 "[A] fact-finder must look to the totality-of-the-circumstances to determine if a parent has assumed parental responsibility." ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶22, 333 Wis. 2d 273, 797 N.W.2d 854. Further, "[w]hen applying [the totality-of-the-circumstances] test, the fact-finder should consider any support or care, or lack thereof, the parent provided the child throughout the child's *entire* life." ***Id.***, ¶73 (emphasis added).

¶29 J.S.'s view of the record is limited to testimony supporting his contention that he made efforts to bond with his child. J.S. largely ignores the majority of the record which demonstrates a vast history of violence between J.S. and the mother of his child, as well as highlighting the role J.S.'s own conduct played in hindering his relationship with his daughter. J.S.'s actions do not establish that he expressed concern for A.L. or her well-being at any point during her pregnancy or after. Even prior to S.L.'s birth, J.S. and A.L. had a volatile relationship marred with violence. During A.L.'s pregnancy, and even following S.L.'s birth, the violence continued, with J.S. attempting to run A.L. over with his car. J.S. repeatedly and knowingly violated his probation rules and DMCPS rules by maintaining contact with A.L., even secretly living with A.L. at one point. J.S.'s actions led to multiple periods of imprisonment, hindering his visitation with his child. The record thus supports the jury's findings.

¶30 To the extent J.S. argues that the circuit court was to make a separate finding of unfitness, we draw J.S.'s attention to ***L.K. v. B.B.***, 113 Wis. 2d 429, 335 N.W.2d 846 (1983). In that case, the Wisconsin Supreme Court expressly asked: "Must a specific finding of parental unfitness be made in order to involuntarily terminate parental rights under section [48.415(6)], Stats.?" ***Id.*** at 442. The court concluded that "[w]here a father shows so little care, support or concern for the well-being of his child that his parental rights may be terminated under section

[48.415(6)], that failure to establish a substantial parental relationship with the child means that the father's interest in contact with his child does not warrant protection under the due process clause of the constitution." ***Id.*** at 447-48. A circuit court need not make a separate finding of unfitness where a father has failed to establish a parental relationship with the child. The record clearly supports the jury's finding that J.S. failed to establish a parental relationship with S.L. Thus, it was not necessary for the circuit court to make a separate finding of unfitness.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.